

Brigham Young University Law School BYU Law Digital Commons

Utah Court of Appeals Briefs

2010

L. Lane Blackmore v. L&D Development, Inc. : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Justin Heideman; R. Brett Evanson; Attorneys for Plaintiffs.

Lamar J. Winward; M. Eric Olmstead; David L. Elmont; Jerome Romero; Attorneys for Defendant.

Recommended Citation

Brief of Appellee, *Blackmore v. L and D Development*, No. 20100200 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2222

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

Justin D. Heideman (USB # 8897)
R. Brett Evanson (USB# 12086)
HEIDEMAN, MCKAY, HEUGLY & OLSEN LLC
2696 North University Ave., Suite #180
Provo, Utah 84604
Telephone: (801) 812-1000
Facsimile: (801) 374-1724
Email: jheideman@hmho-law.com
bevanson@hmho-law.com

IN THE UTAH COURT OF APPEALS

L. LANE BLACKMORE, et al.,

Plaintiffs/Appellees,

vs.

L&D DEVELOPMENT, INC., et al.,

Defendants/Appellant.

BRIEF OF APPELLEES

Court of Appeals Case No. 20100200-CA

District Court No. 030501322

**APPEAL FROM AN INTERLOCUTORY ORDER OF THE FIFTH JUDICIAL
DISTRICT COURT, HONORABLE JAMES L. SHUMATE**

Lamar J. Winward
150 North 200 East, Suite 204
St. George, UT 84770
Attorney for Defendant-Appellants L&D
Development, Inc., and Shadow Canyon
Land Company, LLC

M. Eric Olmstead
David L. Elmont
43 South 100 East, Suite 300
St. George, UT 84771-2710

Jerome Romero
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Attorneys for Defendant-Appellants Shadow Glen
420, Inc.; Gemstone Homes, Inc.; Gemstone
Properties, Inc.; Frank Lindhardt; Eugene Buckley

Counsel Filing Brief
Justin D. Heideman
R. Brett Evanson
2696 N. University Ave., Suite 180
Provo, UT 84604
Attorneys for Plaintiffs

**FILED
UTAH APPELLATE COURTS**

JUL 05 2011

Justin D. Heideman (USB # 8897)
R. Brett Evanson (USB# 12086)
HEIDEMAN, MCKAY, HEUGLY & OLSEN LLC
2696 North University Ave., Suite #180
Provo, Utah 84604
Telephone: (801) 812-1000
Facsimile: (801) 374-1724
Email: jheideman@hmho-law.com
bevanson@hmho-law.com

IN THE UTAH COURT OF APPEALS

L. LANE BLACKMORE, et al.,

Plaintiffs/Appellees,

vs.

L&D DEVELOPMENT, INC., et al.,

Defendants/Appellant.

BRIEF OF APPELLEES

Court of Appeals Case No. 20100200-CA

District Court No. 030501322

**APPEAL FROM AN INTERLOCUTORY ORDER OF THE FIFTH JUDICIAL
DISTRICT COURT, HONORABLE JAMES L. SHUMATE**

Lamar J. Winward
150 North 200 East, Suite 204
St. George, UT 84770
Attorney for Defendant-Appellants L&D
Development, Inc., and Shadow Canyon
Land Company, LLC

M. Eric Olmstead
David L. Elmont
43 South 100 East, Suite 300
St. George, UT 84771-2710

Jerome Romero
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Attorneys for Defendant-Appellants Shadow Glen
420, Inc.; Gemstone Homes, Inc.; Gemstone
Properties, Inc.; Frank Lindhardt; Eugene Buckley

Counsel Filing Brief

Justin D. Heideman
R. Brett Evanson
2696 N. University Ave., Suite 180
Provo, UT 84604
Attorneys for Plaintiffs

LIST OF ALL PARTIES

Justin D. Heideman
R. Brett Evanson
Heideman, McKay, Heugly & Olsen, LLC
2696 N. University Ave., Suite 180
Provo, UT 84604
For: Plaintiffs/Appellees

Lamar J. Winward
150 North 200 East, Suite 204
St. George, UT 84770
For: Defendant/Appellants L&D Development, Inc. and Shadow Canyon Land Company, LLC

M. Eric Olmstead
David L. Elmont
Barney, McKenna & Olmstead, PC
43 South 100 East, Suite 300
St. George, UT 84771-2710
And
Jeffrey Weston Shields
Jerome Romero
Jones, Waldo, Holbrook & McDonough, PC
170 South Main Street, Suite 1500
Salt Lake City, UT 84101
For: Defendants Shadow Glen 420, Inc.; Gemstone Homes, Inc.; Gemstone Properties, Inc.;
Frank Lindhart; and Eugene Buckley

TABLE OF CONTENTS

LIST OF ALL PARTIES.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT.....	6
I. Substantive review of the Memorandum Decision granting partial summary judgment in favor of Plaintiffs is outside the scope of this interlocutory appeal and should not be addressed by this Court.....	6
II. The July 10 th Memorandum Decision issued by the trial court provides more than an adequate basis for a finding of a substantial likelihood of prevailing on the merits of the underlying claim.....	8
III. The Utah Rules of Civil Procedure do authorize a court to transfer property via a prejudgment writ.....	10
CONCLUSION.....	11
ADDENDUM.....	12

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Bell</i> , 234 P.3d 1147 (Utah 2010).....	11
<i>Brewster v. Brewster</i> , 241 P.3d 357 (Utah App. 2010).....	1,8
<i>Butler v. Pinecrest Pipeline Operating Co.</i> , 909 P.2d 225 (Utah 1995).....	9
<i>Child v. Gonda</i> , 972 P.2d 425 (Utah 1998).....	9
<i>Houghton v. Department of Health</i> , 125 P.3d 860 (Utah 2005).....	6
<i>Lilly v. Lilly</i> , 250 P.3d 994 (Utah App. 2011).....	11
<i>Powell v. Cannon</i> , 179 P.3d 799 (Utah 2008).....	7
<i>Robb v. Anderton</i> , 863 P.2d 1322 (Utah App. 1993).....	9
<i>State v. Larsen</i> , 828 P.2d 487 (Utah App. 1992).....	9
<i>Valcarce v. Fitzgerald</i> , 961 P.2d 305 (Utah 1998).....	9
<i>Woodward v. Fazzio</i> , 823 P.2d 474 (Utah App. 1991).....	9

STATUTES

UTAH CODE ANN. § 78A-4-103(2)(j).....	1
---------------------------------------	---

RULES

UTAH R. APP. P. 5.....	7
UTAH R. CIV. P. 64.....	10,11
UTAH R. CIV. P. 64A.....	9
UTAH R. CIV. P. 64C.....	5,9,10

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this interlocutory issue pursuant to UTAH CODE ANN. § 78A-4-103(2)(j).

STATEMENT OF ISSUES

Issue 1: Did the trial court err in finding a substantial likelihood that Plaintiffs would prevail on the merits of the underlying claim as required by UTAH R. CIV. P. 64A(c)(3)? The appropriate standard of review for this issue inasmuch as it includes application of facts to the law is an abuse of discretion standard. *See Brewster v. Brewster*, 241 P.3d 357, fn. 7 (Utah App. 2010).

Issue 2: Did the trial court err in allowing Plaintiffs to take possession of all monies, and immediate, sole, and exclusive legal title to the real property subject to the prejudgment writ?

“A matter of statutory interpretation is a question of law that [the Appellate Court] review[s] for correctness, but because the determination of what constitutes a reasonable inquiry under the RBCA depends on the facts and circumstances of the particular case, we review the trial court’s determination regarding the reasonableness of the inquiry under an abuse of discretion standard.” *Brewster v. Brewster*, 241 P.3d 357, 360 (Utah App. 2010). In this case the matter at issue is not the determination of what constitutes a reasonable inquiry pursuant to the RBCA, but the determination of a substantial likelihood of prevailing on the merits of the underlying claim in the context of the issuance of a prejudgment writ. This analysis is fact intensive and requires the same abuse of discretion standard as applied in *Brewster*.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

UTAH R. CIV. P. 64 WRITS IN GENERAL

(Due to length, a copy of Rule 64 is attached, see Addendum)

**UTAH R. CIV. P. 64A PREJUDGMENT WRITS IN OF REPLEVIN, ATTACHMENT AND
GARNISHMENT**

(Due to length, a copy of Rule 64A is attached, see Addendum)

UTAH R. CIV. P. 64C WRIT OF ATTACHMENT

- (a) Availability. A writ of attachment is available to seize property in the possession or under the control of the defendant.
- (b) Grounds. In addition to the grounds required in Rule 64A, the grounds for a writ of attachment require all of the following:
 - (b)(1) that the defendant is indebted to the plaintiff;
 - (b)(2)(i) that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not qualified to do business in this state; or
 - (b)(2)(ii) the writ is authorized by statute; and
 - (b)(3) that payment of the claim has not been secured by a lien upon property in this state.

STATEMENT OF THE CASE

This case involves breach of contract, intentional interference with business relations, and fraud claims. R. 3506:20-51¹. Plaintiffs entered into a Development Agreement with some of the Defendants that should have resulted in the transfer of the subject property into a newly formed company Blackmore Cannon Development Company ("BCDC"). R. 3505:3. The trial court ruled that the Defendants failed to transfer the property pursuant to the terms of the Development Agreement and therefore primarily breached the Development Agreement. R. 3505:1-8. This resulted in summary judgment in favor of Plaintiffs on their breach of contract claims being granted. R. 3505:6.

Since this ruling did not finalize all of Plaintiffs' claims, Plaintiffs sought a prejudgment writ of attachment to obtain the funds generated from the development and sale of parts the subject property, and to obtain the remaining property. R. 4417-4418:1-10. The trial court

¹ Please note that when Plaintiffs were provided a copy of the record several of the documents were not in order. As a result it was difficult to locate several documents. Plaintiffs simply note this so that the Court understands that the record was returned by Plaintiffs in the exact manner it was received.

granted the requested writ and signed the order transferring funds and property to Plaintiffs. R. 4551-4552.

Defendants subsequently filed an ex-parte motion to stay the order. R. 4555. Plaintiffs objected to the ex-parte motion on the basis, among other reasons, that the ex-parte was improper and violated the Rules of Professional Conduct. R. 4560:1-5.

The issuance of the Prejudgment Writ is now before this Court via interlocutory appeal. R. 4593. By order of this Court the Writ Order was stayed.²

STATEMENT OF FACTS

1. On August 21, 2002, Plaintiffs Lane Blackmore and BCDC entered into the Development Agreement with Defendants L&D Development, Inc., Shadow Canyon Land Company, LLC, and Lester Cannon. R. 3505:2.
2. Pursuant to the terms of the Development Agreement Defendants were required to transfer the subject property to BCDC. R. 3505:3.
3. Defendants failed to transfer the subject property to BCDC pursuant to the terms of the Development Agreement. R. 3505:3.
4. The trial court ruled this failure constituted a material breach of the Development Agreement and granted summary judgment on the issue of breach of contract in favor of Plaintiffs. R. 3505:4-6.
5. The trial court was aware of all affirmative defenses presented by Defendants with respect to the breach of contract since March 11, 2004. R. 184-187.

² This Order was issued by the Court of Appeals on July 20th, 2010, and was signed by the Honorable William A. Thorne, Jr. Plaintiffs were unable to locate this order in the record provided by the Fifth District Court, and the Order did not appear on the Record Index. The Record Index shows a Notice of Withdrawal of Counsel on 5/26/2010 and the next entry is a Certificate of Service on 8/13/2010.

6. Notwithstanding these affirmative defenses, the trial court granted summary judgment on the issue of breach of contract in favor of Plaintiffs. R. 3505:4-6.
7. On or about October 2, 2009 Plaintiffs filed a Motion for Prejudgment Writ of Attachment, and a Memorandum in Support of said Motion. R. R. 4417-4418:1-10.
8. On or about October 19, 2009 Defendants filed their Memorandum in Opposition to the Motion for Prejudgment Writ of Attachment. R. 4465.
9. On or about November 9, 2009 Plaintiffs filed their Reply. R. 4466.
10. The trial court set a one hour hearing for argument on the motion. R. 4478.
11. On January 19, 2010 a hearing was held on the Motion for Prejudgment Writ of Attachment wherein the Court granted Plaintiffs' Motion. R. 4481.
12. On or about January 27, 2010, Defendants filed an Objection to the Order granting the requested writ. R. 4482.
13. On or about January 29, 2010, Plaintiffs filed their Response to Defendants' Objection. R. 4483.
14. The trial court set a hearing for oral arguments on the Objection filed by Defendants for February 25, 2010. R. 4547.
15. After hearing oral argument on the Objection filed by Defendants, the trial court issued an Order granting Plaintiffs' Motion for Prejudgment Writ of Attachment as proposed by Plaintiffs with the exception that Plaintiffs omit the proposed paragraph 4. R. 4554:6.
16. In accordance with the terms of the Development Agreement Plaintiffs constructed the houses on Lots 79 and 108 of the subject property entirely at their own expense. R. 3506:8.

17. Plaintiffs also resolved controversies with the Architectural Control Committees, marketed and sold three existing homes in the development, and paid past due interest to State Bank of Southern Utah. R. 3506:8-9.
18. The trial court concluded that any monies obtained from the use of the property, or the sale of the assets, were solely owned by Plaintiffs since Plaintiffs had constructed the homes that were sold. R. 4551-4552.
19. As a result of this determination the trial court concluded that no bond was required, and that the money and property should immediately transfer to Plaintiffs. R. 4561:24-26.

SUMMARY OF THE ARGUMENT

Defendants' attempt to contest the validity of the Memorandum Decision issued on July 10, 2008 is misplaced as that is not an issue on appeal. This interlocutory appeal is limited to the issuance of the Prejudgment Writ of Attachment on February 26, 2010. Any argument based on the substantive determinations made in the July 10th Memorandum Decision should not be considered as they are not properly before this Court.

The July 10th Memorandum Decision granted summary judgment in favor of Plaintiffs on their breach of contract claims. A specific requirement for the issuance of a prejudgment writ is that the action be based upon a contract. *See* UTAH R. CIV. P. 64C(b)(2)(i). The trial court's ruling that Defendants breached the underlying agreement provides more than adequate support for a finding of a substantial likelihood of prevailing on the merits of the underlying claim.

Defendants' requests to have this Court make determinations with respect to arguments such as waiver, set-off, affirmative defenses in general, and other claims contained in the Third Amended Complaint cannot properly be decided by this Court. Such a determination would require this Court to conduct a detailed review of the underlying case and the accompanying

facts. Defendants have not marshaled the evidence to allow this Court to conduct such a review, and have even failed to properly cite to the record in their brief. Due to this failure, and the standard of review, it would be inappropriate for this Court to overturn the decision of the trial court.

Finally, the trial court's determination to immediately transfer the money and real property to Plaintiffs is appropriate inasmuch as these items are solely attributable to Plaintiffs' actions. Plaintiffs built the houses located on the real property, and the sale of one of those houses is what generated the money subject to the writ. But for Defendants' breach of the Development Agreement, these funds and real property would already be in Plaintiffs' possession.

ARGUMENT

I. Substantive review of the Memorandum Decision granting partial summary judgment in favor of Plaintiffs is outside the scope of this interlocutory appeal and should not be addressed by this Court.

Defendants attempt to argue in their Brief that "the Memorandum Decision was clearly erroneous." *See* Amended Brief of Appellants pg. 17. However, Defendants did not identify the Memorandum Decision as an issue for interlocutory appeal in their Petition for Permission to Appeal Interlocutory Order, Brief of Appellants, in their Statement of Issues, or in their Amended Brief of Appellants in their Statement of Issues. *See* Petition for Permission to Appeal Interlocutory Order and Brief of Appellants pg. 1-2. The Supreme Court has expressly stated that "[o]n interlocutory appeal, we review only those specific issues presented in the petition." *Houghton v. Department of Health*, 125 P.3d 860, 865 (Utah 2005).

Defendants even go so far in their Amended Brief to admit that "the Memorandum Decision granting Plaintiffs partial summary judgment is not directly on appeal in this matter."

See Amended Brief of Appellants pg. 17. Since the matter is not directly on appeal, and *Houghton* is clear that appellate courts will only review the issues specifically presented in the petition it would be inappropriate for this Court to conduct a review of the validity of the Memorandum Decision granting partial summary judgment. The substantive decision of the trial court set forth in the Memorandum Decision granting partial summary judgment on the issue of breach of contract should not be addressed, and should be considered appropriate and binding for purposes of this Interlocutory Appeal.

Additionally, UTAH R. APP. P. 5 requires that “An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court.” The Utah Supreme Court explained that “any petition seeking interlocutory review must be filed within twenty days of the issuance of the order sought to be appealed.” *Powell v. Cannon*, 179 P.3d 799, 806 (Utah 2008). This is a jurisdictional requirement and makes parties seeking interlocutory review of non-final decisions of a trial court ineligible for such relief if the twenty day time period expires. *See id.*

The Memorandum Decision was issued on July 10, 2008. Defendants did not file their Petition for Permission to Appeal Interlocutory Order until March 9, 2010. This is well after the twenty day time period, and prevents this Court from having jurisdiction to even address the substance of the July 10th Memorandum Decision. Defendants have provided no legal support in the form of rules or case law for their claim that “it is appropriate to raise the clear error they perceive in the Memorandum Decision at this time.” *See* Amended Brief of Appellants, pg. 18. Put simply, it is not appropriate to raise this issue according to UTAH R. APP. P. 5 and *Powell*.

Accordingly, Plaintiffs request this Court preserve its judicial resources and entirely refrain from addressing the substance of the July 10th Memorandum Decision entered by the trial court.

II. The July 10th Memorandum Decision issued by the trial court provides more than an adequate basis for a finding of a substantial likelihood of prevailing on the merits of the underlying claim.

In order for a party to obtain a pre-judgment writ of attachment, such as has been granted in this case, that party must satisfy the requirements set forth in UTAH R. CIV. P. 64A and 64C. Defendants argue that the trial court's issuance of the requested writ was inappropriate because "the mere fact that the trial court found a breach of contract on summary judgment does not of itself mean that Plaintiffs are substantially likely to succeed on the merits of their claims." *See* Amended Brief of Appellants, pg. 24. Appellants do not argue anywhere in their brief that any of the other required elements set forth in UTAH R. CIV. P. 64A and 64C have not been satisfied. As such, the only issue to be addressed by this Court with respect to the appropriateness of the issuance of the writ is whether or not the trial court erred in finding that the Plaintiffs have satisfied the substantially likelihood of prevailing on the merits of the underlying claim element. Such an evaluation requires both a review of factual and legal determinations. "Discretion is broadest – and the standard of review is most deferential – when the application of a legal concept is highly fact dependant and variable." *Brewster v. Brewster*, 241 P.3d 357, 360 (Utah App. 2010). Additionally, "in fact-dependent cases such as this, we review the trial court's application of the law to the facts for an abuse of discretion." *Id.* at fn. 7. Plaintiffs acknowledge that summary judgment by necessity means there are no issues of material fact, but that does not alter the requirement of a court to apply those facts to the law as was done in this matter.

In this case Defendants have failed to properly marshal evidence thereby essentially preventing this Court from reviewing the facts of this case used in reaching the determination

made in the July 10th Memorandum Decision. An appellate court should not review facts unless the appealing party has fully complied with the marshaling requirement. *See Child v. Gonda*, 972 P.2d 425, 434 (Utah 1998). The marshaling requirement “serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder.” *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991). Proper marshaling of the evidence “provides the appellate court the basis from which to conduct a meaningful and expedient review of facts.” *Robb v. Anderton*, 863 P.2d 1322, 1328 (Utah App. 1993). This Court “is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” *State v. Larsen*, 828 P.2d 487, 491 (Utah App. 1992). Merely presenting selected facts in support of their own position is not sufficient, nor is merely rearguing the same case made before the trial court. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998) and *Butler v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225, 236 (Utah 1995). Defendants have done nothing more in presenting facts and argument to this Court than presenting a few facts that Defendants consider beneficial to themselves, and then rearguing the position they presented to the trial court. Based on that argument and many more facts, the trial court determined that issuance of the writ was appropriate.

The granting of a motion for summary judgment on the issue of breach of contract provides more than an adequate basis for satisfying the substantial likelihood of prevailing on the merits of the underlying claim. UTAH R.C.P. Rule 64A(c)(3) only requires “a substantial likelihood that the plaintiff will prevail on the merits of the underlying claim.” It does not require that Plaintiffs succeed on all of their claims. UTAH R.C.P. Rule 64C(b)(2)(i) only requires “that the action is upon a contract.” The Memorandum Decision entered by the trial

court on July 7, 2010 determined that Plaintiffs prevailed on their contract cause of action. As such, not only did the trial court determine Plaintiffs had a substantial likelihood of prevailing on the merits of their contract claim, the trial court determined that Plaintiffs had in fact prevailed on that claim. Since UTAH R.C.P. Rule 64C(b)(2)(i) only requires a claim based on a contract, Plaintiffs are not required to prevail on their remaining claims in order to be entitled to the prejudgment writ of attachment issued by the trial court.

Since Defendants have failed to marshal any evidence to support their affirmative defense claims, waiver argument, and set-off argument, Defendants have placed this Court in a situation where it simply cannot address those issues. As a result, this Court should sustain the determination made by the trial court and the prejudgment writ of attachment should be deemed valid.

III. The Utah Rules of Civil Procedure do authorize a court to transfer property via a prejudgment writ.

The trial court determined that it was appropriate in this matter to grant Plaintiffs the “immediate possession of all monies ... up to the amount of \$150,000.00” and “immediate, sole, and exclusive legal title in Lot 108...” R. 4551-4552. Defendants argue that this action was improper and not permitted by law. *See* Amended Brief, pg. 27. However, Defendants fail to cite to any case that explains that such action was improper. Instead, Defendants attempt to use language that outlines some of the proper uses of a prejudgment writ. The case law presented by Defendants is accurate, but at no point does it preclude the actions taken by the trial court in this matter.

While the case law presented by Defendants does not specifically preclude the action taken by the trial court, the UTAH RULES OF CIVIL PROCEDURE specifically allow for such action to be taken. UTAH R.CIV.P. Rule 64(d)(2) specifically provides that “[t]he writ may direct the

officer to seize the property, to keep the property safe, *to deliver the property to plaintiff*, to sell the property, or to take other specified actions.” (emphasis added). This language specifically authorizes the court to “deliver the property to plaintiff.” It should be noted that nowhere in Rule 64(d) does it specifically differentiate between a prejudgment writ and a writ. However, Rule 64(d)(2)(A) and 64(d)(2)(B) do reference the issuance of writs before judgment and in so doing refer to said writs in the same manner used in Rule 64(d)(2) that permits delivery of the property to a plaintiff. “In interpreting statutory provisions [courts] look first to the plain language of the statute. A plain language analysis is not limited to ‘individual words and subsections in isolation’; rather, statutory interpretation requires that each part or section ‘be constructed in connection with every other part or section so as to produce a harmonious whole.” *Lilly v. Lilly*, 250 P.3d 994, 999 (Utah App. 2011) (citing *Anderson v. Bell*, 234 P.3d 1147, 1150 (Utah 2010)). Applying this principal to the present issue, a complete review of Rule 64 demonstrates a court is authorized to deliver property to a plaintiff on both prejudgment writs as well as post judgment writs.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court deny Defendants’ Interlocutory Appeal.

RESPECTFULLY SUBMITTED this 5th day of July, 2011.

HEIDEMAN, MCKAY, HEUGLY & OLSEN



R. BRETT EVANSON

Attorney for Plaintiffs/Appellees

ADDENDUM

1. UTAH RULE OF CIVIL PROCEDURE 64
2. UTAH RULE OF CIVIL PROCEDURE 64A

ADDENDUM 1

UTAH RULE OF CIVIL PROCEDURE 64

Rule 64. Writs in general.

(a) Definitions. As used in Rules 64, 64A, 64B, 64C, 64D, 64E, 69A, 69B and 69C:

(a)(1) "Claim" means a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2) "Defendant" means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3) "Deliver" means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4) "Disposable earnings" means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5) "Earnings" means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6) "Notice of exemptions" means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice shall list examples of exempt property and indicate that other exemptions may be available. The notice shall instruct the defendant of the deadline for filing a reply and request for hearing.

(a)(7) "Officer" means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property.

(a)(8) "Plaintiff" means the party filing a claim or in whose favor judgment has been entered.

(a)(9) "Property" means the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

(a)(10) "Serve" with respect to parties means any method of service authorized by Rule 5 and with respect to non-parties means any manner of service authorized by Rule 4.

(b) Security.

(b)(1) Amount. When security is required of a party, the party shall provide security in the sum and form the court deems adequate. For security by the plaintiff the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from the necessity of providing security if it appears that none of the parties will incur damages, costs or attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial reason for dispensing with security. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the writ is

wrongfully obtained.

(b)(2) Jurisdiction over surety. A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety shall file with the clerk of the court the address to which the clerk may mail papers. The surety's liability may be enforced on motion without the necessity of an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for return of property ordered returned.

(b)(3) Objection. The court may issue additional writs upon the original security subject to the objection of the opposing party. The opposing party may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

(b)(4) Security of governmental entity. No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c) Procedures in aid of writs.

(c)(1) Referee. The court may appoint a referee to monitor hearings under this subsection.

(c)(2) Hearing; witnesses; discovery. The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify and produce records. The court may permit discovery.

(c)(3) Restraint. The court may forbid any person from transferring, disposing or interfering with the property.

(d) Issuance of writ; service

(d)(1) Clerk to issue writs. The clerk of the court shall issue writs. A court in which a transcript or abstract of a judgment or order has been filed has the same authority to issue a writ as the court that entered the judgment or order. If the writ directs the seizure of real property, the clerk of the court shall issue the writ to the sheriff of the county in which the real property is located. If the writ directs the seizure of personal property, the clerk of the court may issue the writ to an officer of any county.

(d)(2) Content. The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ shall specify the amount ordered to be paid and the amount due.

(d)(2)(A) If the writ is issued ex parte before judgment, the clerk shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B) If the writ is issued before judgment but after a hearing, the clerk shall attach to the writ plaintiff's affidavit and detailed description of the property.

(d)(2)(C) If the writ is issued after judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3) Service.

(d)(3)(A) Upon whom; effective date. The officer shall serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B) Limits on writs of garnishment.

(d)(3)(B)(i) A writ of garnishment served while a previous writ of garnishment is in effect is effective upon expiration of the previous writ; otherwise, a writ of garnishment is effective upon service.

(d)(3)(B)(ii) Only one writ of garnishment of earnings may be in effect at one time. One additional writ of garnishment of earnings for a subsequent pay period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C) Return; inventory. Within 10 days after service, the officer shall return the writ to the court with proof of service. If property has been seized, the officer shall include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give the officer an affidavit describing the property, the officer shall indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding taken for the purpose of obtaining such information.

(d)(3)(D) Service of writ by publication. The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i) If service of a writ is by publication, substantially the following shall be published under the caption of the case:

To _____, [Defendant/Garnishee/Claimant]:

A writ of _____ has been issued in the above-captioned case commanding the officer of _____ County as follows:

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. You have the right to claim property exempt from seizure under statutes of the United States or this state, including Utah Code, Title 78B, Chapter 5, Part 5.

(d)(3)(D)(ii) The notice shall be published in a newspaper of general circulation in each county in which the property is located at least 10 days prior to the due date for the reply or at least 10 days prior to the date of any sale, or as the court orders. The date of publication is the date of service.

(e) Claim to property by third person.

(e)(1) Claimant's rights. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

(e)(2) Join claimant as defendant. The court may order any named claimant joined as a defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is thereafter a defendant to the action and shall answer within 10 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.

(e)(3) Plaintiff's security. If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request that the court require the plaintiff to file security.

(f) Discharge of writ; release of property.

(f)(1) By defendant. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file security and a motion to discharge the writ. The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the motion. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained. The court shall give the plaintiff reasonable opportunity to correct a defect. The defendant shall serve the order to discharge the writ upon the officer, plaintiff, garnishee and any third person claiming an interest in the property.

(f)(2) By plaintiff. The plaintiff may discharge the writ by filing a release and serving it upon the officer, defendant, garnishee and any third person claiming an interest in the property.

(f)(3) Disposition of property. If the writ is discharged, the court shall order any remaining property and proceeds of sales delivered to the defendant.

(f)(4) Copy filed with county recorder. If an order discharges a writ upon property seized by filing with the county recorder, the officer or a party shall file a certified copy of the order with the county recorder.

(f)(5) Service on officer; disposition of property. If the order discharging the writ is served on the officer:

(f)(5)(A) before the writ is served, the officer shall return the writ to the court;

(f)(5)(B) while the property is in the officer's custody, the officer shall return the property to the defendant; or

(f)(5)(C) after the property is sold, the officer shall deliver any remaining proceeds of the sale to the defendant.

ADDENDUM 2

UTAH RULE OF CIVIL PROCEDURE 64A

Rule 64A. Prejudgment writs in general.

(a) Availability. A writ of replevin, attachment or garnishment is available after the claim has been filed and before judgment only upon written order of the court.

(b) Motion; affidavit. To obtain a writ of replevin, attachment or garnishment before judgment, plaintiff shall file a motion, security as ordered by the court and an affidavit stating facts showing the grounds for relief and other information required by these rules. If the plaintiff cannot by due diligence determine the facts necessary to support the affidavit, the plaintiff shall explain in the affidavit the steps taken to determine the facts and why the facts could not be determined. The affidavit supporting the motion shall state facts in simple, concise and direct terms that are not conclusory.

(c) Grounds for prejudgment writ. Grounds for a prejudgment writ include, in addition to the grounds for the specific writ, all of the requirements listed in subsections (c)(1) through (c)(3) and at least one of the requirements listed in subsections (c)(4) through (c)(10):

(c)(1) that the property is not earnings and not exempt from execution; and

(c)(2) that the writ is not sought to hinder, delay or defraud a creditor of the defendant; and

(c)(3) a substantial likelihood that the plaintiff will prevail on the merits of the underlying claim; and

(c)(4) that the defendant is avoiding service of process; or

(c)(5) that the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, the property with intent to defraud creditors; or

(c)(6) that the defendant has left or is about to leave the state with intent to defraud creditors; or

(c)(7) that the defendant has fraudulently incurred the obligation that is the subject of the action; or

(c)(8) that the property will materially decline in value; or

(c)(9) that the plaintiff has an ownership or special interest in the property; or

(c)(10) probable cause of losing the remedy unless the court issues the writ.

(d) Statement. The affidavit supporting the motion shall state facts sufficient to show the following information:

(d)(1) if known, the nature, location, account number and estimated value of the property and the name, address and phone number of the person holding the property;

(d)(2) that the property has not been taken for a tax, assessment or fine;

(d)(3) that the property has not been seized under a writ against the property of the plaintiff or that it is exempt from seizure;

(d)(4) the name and address of any person known to the plaintiff to claim an interest in the property; and, if the motion is for a writ of garnishment,

(d)(5) the name and address of the garnishee; and

(d)(6) that the plaintiff has attached the garnishee fee established by Utah Code Section 78A-2-216.

(e) Notice, hearing. The court may order that a writ of replevin, attachment or garnishment be issued before judgment after notice to the defendant and opportunity to be heard.

(f) Method of service. The affidavit for the prejudgment writ shall be served on the defendant and any person named by the plaintiff as claiming an interest in the property. The affidavit shall be served in a manner directed by the court that is reasonably calculated to expeditiously give actual notice of the hearing.

(g) Reply. The defendant may file a reply to the affidavit for a prejudgment writ at least 24 hours before the hearing. The reply may:

(g)(1) challenge the issuance of the writ;

(g)(2) object to the sufficiency of the security or the sufficiency of the sureties;

(g)(3) request return of the property;

(g)(4) claim the property is exempt; or

(g)(5) claim a set off.

(h) Burden of proof. The burden is on the plaintiff to prove the facts necessary to support the writ.

(i) Ex parte writ before judgment. If the plaintiff seeks a prejudgment writ prior to a hearing, the plaintiff shall file an affidavit stating facts showing irreparable injury to the plaintiff before the defendant can be heard or other reason notice should not be given. If a writ is issued without notice to the defendant and opportunity to be heard, the court shall set a hearing for the earliest reasonable time, and the writ and the order authorizing the writ shall:

(i)(1) state the grounds for issuance without notice;

(i)(2) designate the date and time of issuance and the date and time of expiration;

(i)(3) designate the date, time and place of the hearing;

(i)(4) forthwith be filed in the clerk's office and entered of record;

(i)(5) expire 10 days after issuance unless the court establishes an earlier expiration date, the defendant consents that the order and writ be extended or the court extends the order and writ after hearing;

(i)(6) be served on the defendant and any person named by the plaintiff as claiming an interest in the property in a manner directed by the court that is reasonably calculated to

expeditiously give actual notice of the hearing.


CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 2011, I caused eight copies of Brief of Appellees, one of which contains an original signature, to be hand delivered to the Clerk of the Court of Appeals, and two copies to be mailed, first class, postage pre-paid, to the following:

M. Eric Olmstead
David L. Elmont
Barney, McKenna & Olmstead, PC
43 South 100 East, Suite 300
St. George, UT 8477102710

LaMar Winward
150 North 200 East, #204
St. George, UT 84770

Jerome Romero
Jones, Waldo, Holbrook & McDonough
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, UT 84101


R. Brett Evanson